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No. 96-976

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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND
JACK BUTLER RACKLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the imposition upon petitioners of monetary fines as *in personam* money penalties by the Department of the Treasury, together with other sanctions, is "punishment" for purposes of the Double Jeopardy Clause and, therefore, bars subsequent indictment for the same conduct.

2. Whether such fines may be deemed remedial by reference to the "cost of investigation" allegedly incurred by the agency which assessed them when:

   a. the statute pursuant to which the fines were assessed contains specific criteria for imposing fines and does not authorize consideration of "investigatory costs";

   b. no agency of government contends it was a victim of the conduct for which fines were imposed; and

   c. "costs of investigation" were not considered by the agency assessing the fines in determining whether to impose the fines or the amount thereof.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-8a) is reported at 92 F.3d 1026. The opinion of the United States District Court for the Western District of Oklahoma (Pet. App. 9a-14a) is reported at 879 F. Supp. 1113. A previous opinion of the court of appeals in this case (Pet. App. 69a-81a) is reported at 14 F.3d 536, while a previous opinion of the district court (Pet. App. 82a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on September 20, 1996. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on December 17, 1996, and was granted on April 14, 1997. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The provisions of 12 U.S.C. §§ 93(b) and 504 and 18 U.S.C. §§ 371, 656, 1005, and 2 are reproduced in the appendix to the petition for certiorari. The provisions of 12 U.S.C. §§ 84 and 375b are reproduced in the joint appendix (J.A. 53-60).

STATEMENT

Petitioners, who were officers or directors at certain Oklahoma banks, were alleged by the Office of the Comptroller of the Currency ("OCC") to have caused the banks to make "nominee loans," in violation of 12 U.S.C. §§ 84 and 375b. As a result of those violations, petitioners were

subjected in 1989 to money penalties, under 12 U.S.C. §§ 93(b) and 504, and were prohibited from further participation in the affairs of any insured depository institution. Three years later, petitioners were indicted for precisely the same conduct. Petitioners moved to dismiss the indictment, replying on the "multiple punishments" protection of the Double Jeopardy Clause. The court of appeals rejected that claim. Because "there was no gross disproportionality" between the amount of the money penalties and the government's investigative costs in the civil proceeding, the court concluded that the civil sanctions were remedial, not punitive. The court so held even though the money penalties were paid, not to the banks (which were allegedly injured by petitioners' conduct), but to the government (which was not).

A. Statutory Framework

12 U.S.C. §§ 84 and 375b place limitations on the lending policies of banks.[1] Section 84, as implemented by 12 C.F.R. § 32.5, limits the total unsecured loans that a national bank may make to a given individual, while Section 375b, as implemented by 12 C.F.R. §§ 31.2(b) and 215.4(b), limits the amount of money that banks may lend to certain insiders absent prior approval of the board of directors.

Persons who violate Sections 84 or 375b are subject to an array of civil sanctions. First, violators are subject, in their "personal and individual capacit[ies]," to lawsuits seeking to recover any damages arising from the violation. 12 U.S.C. §§ 93(a), 503. Second, the OCC is authorized to impose "a civil

[1] These provisions have been amended in certain respects since the events at issue in this case. Specifically, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 increased the potential range and amount of penalties that may be imposed. See Pub. L. 107-73, § 901(e) (amending 12 U.S.C. § 1818); *id.* §907(e) (amending 12 U.S.C. 93(b)). We refer in the text to the versions in effect at the times relevant to this proceeding.

money penalty of not more than $1,000 per day for each day during which such violation continues." 12 U.S.C. §§ 93(b)(1), 504(a). Finally, if the regulators determine that the violation involves "personal dishonesty" or "willful or continuing disregard" for bank safety, they are authorized by 12 U.S.C. § 1818(e) to institute removal proceedings that may culminate in a prohibition of the individual from any future participation in the affairs of an insured depository institution.

To implement its authority to impose money penalties, the OCC has developed a "CMP [Civil Money Penalty] Matrix." See Ex. 4 (J.A. 39). The matrix lists thirteen factors that the agency will consider in making the penalty assessment. These factors include: willfulness, insider status, previous administrative warnings, history of similar violations, loss, number of violations, duration of violations, continuation of violations after notification by agency, degree of concealment, impact on the industry, payment of restitution, intent or good faith, and cooperation with authorities.

B. The Present Controversy

1. a. During the early and mid-1980's, petitioner John Hudson was the chairman and controlling shareholder of the First National Bank of Tipton, in Tipton, Oklahoma ("Tipton") and the First National Bank of Hammon, in Hammon, Oklahoma ("Hammon"). During the same period of time, petitioner Jack B. Rackley was president at Tipton and a director at Hammon, and petitioner Larry Baresel was a director at both Tipton and Hammon. Pet. App. 89a-90a.

On February 13, 1989, the OCC issued a "Notice of Assessment of a Civil Money Penalty," assessing a $100,000 penalty against Hudson and $50,000 penalties against both Rackley and Baresel, on account of alleged violations of 12 U.S.C. §§ 84 and 375b. Pet. App. 89a-98a. In particular, the OCC alleged that petitioners had arranged for a series of "nominee loans" to be made by Tipton, Hammon, and other institutions to various third parties for the actual benefit of

Hudson, who thereafter used the proceeds to redeem certain bank stock previously held as collateral to secure loans on which Hudson had defaulted. Pet. App. 90a-92a. The Notice specified eight nominee loans that were made between December 29, 1986 and December 31, 1986 (Pet. App. 92a-93a), and an additional thirteen loans that were made between February 19, 1987 and February 27, 1987 (Pet. App. 94a-95a). According to the OCC, these loans were "attributable" to Hudson under OCC regulations and therefore caused both Tipton and Hammon to exceed the lending limits imposed by 12 U.S.C. §§ 84 and 375b. Pet. App. 96a-97a.

In calculating the amount of the assessments, the OCC applied its "Civil Money Penalty Matrix." See Pet. App. 52a. For each petitioner, the agency assessed ten criteria on a scale of 0 to 4, "reflect[ing] progressive levels of severity," and then multiplied each criterion by a prescribed "weight factor." Ex. 4; J.A. 39. For example, the OCC determined that Hudson merited a 3 out of 4 for "willful[ness]," which was then multiplied by a "weight factor" of 5 (the second highest weight factor on the Matrix). The agency also scored Hudson a 3 out of 4 for "concealment," concluding that he had "purposely complicated [the] transaction to make it more difficult to uncover." Ex. 4. This criterion likewise took a "weight factor" multiplier of 5. After weighing the first ten factors, the agency then considered the remaining three criteria — "restitution," "good faith," and "full cooperation" — and subtracted any credits gained in those areas from the subtotal obtained from the first ten factors. Here Hudson got virtually no credit. For example, in the category "good faith" — where the grading ranged from 0 for "none" to 4 for "unintentional violation" — Hudson was scored a 0. Hudson's total score was 109, which resulted in a $100,000 assessment. Substantially the same process was employed by the OCC in assessing penalties of $50,000 against petitioners Baresel and Rackley. Pet. App. 58a-60a.

b. On August 31, 1989, the OCC issued a "Notice of Intention to Prohibit Further Participation" against each of the petitioners. Pet. App. 99a-108a (Hudson Notice), 109a-118a (Baresel Notice), 119a-128a (Rackley Notice). Each Notice was premised on the identical allegations that formed the basis of the Money Penalty Assessments. Compare Pet. App. 90a-97a with *id.* at 100a-107a, 110a-117a, and 120a-127a. Based on those allegations of misconduct, the Comptroller concluded that petitioners had evidenced "a willful and continuing disregard for [the] safety and soundness" of the two banks (*id.* at 108a, 118a, 128a) and that accordingly each of the three petitioners should be prohibited "from further participation, in any manner, in the conduct of the affairs of any insured depository institution" (*id.* at 100a, 110a, 120a). "In essence, the OCC sought to prohibit [petitioners] from all banking activities." Pet. App. 70a.

c. In agreements executed by the parties in October and November 1989, petitioners consented to the imposition of civil money penalties: $16,500 against Hudson, $12,500 against Rackley, and $15,000 against Baresel. Petitioners also consented to a broad prohibition stating that, absent "prior written consent of both the Comptroller and [other agency heads]," they would not "participate in any manner" in the affairs of, *inter alia*, "any insured depository institution," "any institution treated as an insured bank," "any insured credit union," or "any institution chartered under the Farm Credit Act of 1971." Pet. App. 129a-133a (Hudson Stipulation), 134a-138a (Rackley Stipulation), 139a-143a (Baresel Stipulation).[2]

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[2] Each of the Stipulations also contained language stating that nothing in the agreement would constitute "a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate." Pet. App. 133a, 138a, 143a.

2. On August 25, 1992, petitioners were indicted in the United States District Court for the Western District of Oklahoma in a 22-count indictment that is concededly based on "the same transactions upon which the OCC sanctions were based" (Pet. App. 2a-3a). See Brief for the United States at 4. The indictment charged petitioners with misapplication of funds in violation of 18 U.S.C. §§ 656 and 2 (Counts 2-7, 9-18, 20-22), and with conspiracy to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. § 371 (Count 1). The indictment also charged petitioner Rackley with two substantive counts of making false bank entries in violation of 18 U.S.C. § 1005 (Counts 8 and 19).[3]

The indictment recited the same underlying transactions as the OCC Notices. Each of the misapplication counts corresponded to a particular "nominee loan" for which petitioners had already been civilly sanctioned. Compare J.A. 17-38 with Pet. App. 90a-97a. Each of the overt acts in the conspiracy count likewise corresponded to nominee loans and to the use of those loans in redeeming Hudson's stock. Compare J.A. 12-17 with Pet. App. 90a-97a. And the two false entry counts were based on two particular nominee loans in which Rackley had been involved. Compare J.A. 23-24, 34-35 with Pet. App. 93a, 94a.

Petitioners thereafter moved to dismiss the indictment on double jeopardy grounds. In an Order dated March 25, 1993, the trial court denied the motion. Pet. App. 82a-88a. Relying (Pet. App. 84a-85a) on this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), the court acknowledged that

[3] More specifically, Hudson was charged in the conspiracy count and in all of the misapplication counts. Rackley was charged in the conspiracy count, in seventeen of the misapplication counts (Counts 2, 4-7, 9-10, 12-18, and 20-22), and in both false entry counts. Baresel was charged in the conspiracy count and in fifteen of the misapplication counts (Counts 2, 4-7, 9-13, 16, 18, and 20-22).

"'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as serving either retributive or deterrent purposes, is punishment" (Pet. App. 85a). And the court recognized as well (*ibid.*) that the principles in *Halper* "'should apply whether the civil penalty precedes or follows the criminal proceeding.'" The court concluded (*id.* at 85a-86a), however, "that the non-participation agreement and the agreed fines were solely remedial." The court alternatively concluded (Pet. App. 88a) that petitioners had waived any double jeopardy claim by agreeing to the language in the Stipulations stating that the agreements "did not constitute 'a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.'"

3. The court of appeals reversed in part, affirmed in part, and vacated and remanded in part. Pet. App. 69a-81a. The court first rejected (*id.* at 71a-72a) the contention that petitioners had waived their double jeopardy rights. On the merits, the court explained that, under *Halper* and this Court's subsequent decision in *Austin* v. *United States*, 509 U.S. 602 (1993), "a sanction should be considered punishment if it is not solely remedial," and that "if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite the fact that the sanction is also remedial." The court also stated (Pet. App. 75a) that "a civil sanction's being exacted first does not alter the applicability of *Halper*."

In applying these principles, the court of appeals considered each of the sanctions separately (rather than as a combined exaction). Pet. App. 75a-78a (nonparticipation sanctions), 78a-81a (money sanctions). The court agreed with the district court that the nonparticipation sanction was remedial because it "was solely designed to protect the integrity of the banking industry by purging the system of corrupt influences" (*id.* at 78a). However, it vacated the trial

court's ruling on the money sanctions. The court explained (*id.* at 79a) that merely because the penalty statutes as a whole may serve remedial ends "does not necessarily mean that sanctions imposed thereunder are solely remedial." Moreover, the court noted (Pet. App. 79a-80a), the factors that are taken into account in imposing money penalties — such as "history of violations, a party's financial resources and good faith, and the gravity of the violation" — "are equally consistent with a deterrence determination." What is more, the court observed (*id.* at 80a), the $1000 per day penalties contained in 12 U.S.C. §§ 93(b) and 504 "appear to be designed, at least in part, to punish and deter improper conduct."[4] And even if the money penalties were "reasonable," the court added (Pet. App. 80a), that would not necessarily resolve the double jeopardy inquiry: "[A] money sanction can be reasonably related to one's violations and still be used as punishment."

The court therefore remanded the case so that the district court could "determine the precise injury caused to the Government for which the sanctions are the remedy." Pet. App. 80a. "If there was no injury to be remedied, then presumably the fines were imposed to deter the [petitioners] from continued violations. If there was an injury, the court must determine if the fines were in fact intended solely to remedy the injury, which will include a determination whether they were reasonable." *Id.* at 81a.[5]

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[4] In that connection, the court noted (Pet. App. 80a) that there is a separate statutory provision, 12 U.S.C. § 93(a), that provides a compensatory remedy for "injured parties for losses incurred by the same conduct that is subjected to penalties pursuant to §§ 93(b) and 504."

[5] The court also stated (Pet. App. 81a) that on remand it might be necessary to decide whether the offenses for which petitioners were sanctioned civilly were the same as those on which they had been indicted.

4. On remand, the trial court entertained a hearing on whether the money penalties constituted "punishment" within the meaning of double jeopardy principles. Pet. App. 20a-68a. The government called one witness, Daniel Stipano, the Assistant Director of the Enforcement and Compliance Division of the OCC. *Id.* at 22a. Stipano explained that the civil money penalties in this case were not intended to provide restitution, as the OCC did not have "the legal authority to order restitution at that time." *Id.* at 33a. Instead, the penalties were generally intended "to deter future violations of law or encourage the correction of existing violations," while the removal action was designed to prevent petitioners "from working in the banking industry again so that they cannot engage in additional violations or inside practices." *Id.* at 36a. What is more, Stipano added, the penalties were reserved for cases of willful misconduct; in fact, he stated, the OCC did not at the time have the authority to make the assessments it did in this case had petitioners' conduct been merely negligent. *Id.* at 62a.

Stipano also provided testimony concerning the government's costs of investigation and prosecution. Pet. App. 33a-34a, 38a-40a; Ex. 19. The centerpiece of this proof was Exhibit 19, a letter to the prosecutor in which Stipano had estimated the total costs at about $72,000. See Pet. App. 44a. In calculating the costs, Stipano was able to estimate some figures, such as travel, with "a degree of reliability," while others were "less precise." In the latter category, Stipano included his and his colleagues' salaries, where to make the estimates he simply divided the annual salaries plus benefits by the percentage of time that he thought was allocable to this investigation. *Id.* at 39a-40a.

Stipano made clear, however, that these costs of investigation and prosecution had nothing to do with the decision to impose money penalties or the amount of penalties imposed. Indeed, when asked whether the purpose of his letter to the prosecutor (Ex. 19) was to "establish[] what you

claim to be the government loss for purposes of this hearing." Stipano replied: "I don't know why he wanted it. He asked me to provide it." Pet. App. 38a.[6] Clearly, the original penalty assessments were made without regard to the government's costs — in fact, the initial recommendation that assessments of $100,000 and $50,000 be imposed (as they ultimately were) was made before virtually any of the investigatory and prosecution costs had been incurred. *Id.* at 40a-42a. As for the eventual amount of the money penalties, Stipano stated that "[t]he primary reason" why they were less than the assessments was that petitioners "had no money." *Id.* at 31a-32a.

On December 16, 1994, the district court granted the motion to dismiss the indictment on double jeopardy grounds. Pet. App. 9a-14a. Applying (*id.* at 10a) this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court first held that the offenses in both the civil and criminal proceedings were the same for double jeopardy purposes. The government had "concede[d] that the violations which were the subject of the Consent Order and those charged in the indictment are based on the same loan transactions." Pet. App. 11a. Moreover, the court observed (*ibid.*), "a violation of the statutes under which the OCC proceeded in the Consent Order necessarily encompasses a violation of 18 U.S.C. § 656."

The court next held (Pet. App. 12a-14a) that the money penalties in this case were not "solely remedial" and must therefore be regarded as punishment for double jeopardy purposes. Based on the testimony and exhibits, the court found (*id.* at 13a) that the sanctions were designed, at least in part, as a "'deterrent to similar violations * * * by other banks

[6] In fact, Stipano began to assemble the information in Exhibit 19 only about one week before sending the letter to the prosecutor. Pet. App. 38a.

and bankers.'" Moreover, "[t]he evidence before the court does not indicate that injury to the government was considered by the OCC in deciding the amount of the penalties to be imposed." *Id.* at 13a-14a. Indeed, the court observed (*id.* at 14a), "Mr. Stipano testified that the OCC did not have the legal authority to use its enforcement powers to compel officers and directors to make restitution under the statutory provisions in existence at the time the penalties were assessed." And while there was evidence suggesting that the government had incurred "investigative costs" of about $72,000, "the record contains no indication that these costs were considered by the OCC in determining the recommended fines" (*ibid.*). The district court concluded (*ibid.*): "Assuming, *arguendo*, that these [civil sanctions] had some remedial purpose, the evidence establishes that they were at least partially designed to serve as a deterrent. Thus, the fines were punitive for double jeopardy purposes."

5. The court of appeals again reversed. Pet. App. 1a-8a. In the court's view (*id.* at 4a), "[u]nder the objective test outlined in *Halper*, a particular sanction is not punishment when it bears a rational relation to the goal of compensating the government for its loss." In the present case, the court observed (*ibid.*), "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000."[7]

INTRODUCTION AND SUMMARY OF ARGUMENT

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and

[7] Having concluded that the civil sanctions did not constitute punishment, the court declined to reach the question whether the civil sanctions were imposed for the "same offenses" as were charged in the indictment. Pet. App. 3a n.3.

multiple punishments for the same offense." *United States* v. *Halper*, 490 U.S. 435, 440 (1989). Accord, *Ohio* v. *Johnson*, 467 U.S. 493, 498-499 (1984); *Illinois* v. *Vitale*, 447 U.S. 410, 415 (1980); *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Moreover, with respect to the "multiple punishments" component, "the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* of such punishment." *Witte* v. *United States*, 115 S. Ct. 2199, 2204 (1995) (emphasis in the original). Thus, the Double Jeopardy Clause prohibits, not only punishing twice, but also "'attempting a second time to punish criminally for the same offense.'" *United States* v. *Ursery*, 116 S. Ct. 2135, 2139-2140 (1996).

Applying those principles, this Court unanimously held in *United States* v. *Halper*, 490 U.S. 435 (1989), that money penalties, although imposed in a civil proceeding, constitute "punishment" for double jeopardy purposes when they "cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes." *Id.* at 448 (emphasis added). As we show below, the government did not establish *any* remedial purpose served by the money penalties it imposed on petitioners. Still less can it be said that the penalties served *solely* a remedial purpose. In short, the money penalties — particularly when considered in conjunction with the debarment imposed on petitioners — were plainly punitive. Moreover, because the indictment in this case charges petitioners with "the same offenses" for which they were civilly sanctioned, and because it is irrelevant for double jeopardy purposes that the civil sanctions preceded the criminal sanctions (rather than vice versa), the district court correctly dismissed the indictment, and the court of appeals' contrary ruling should be reversed.

A. The money penalties were clearly punitive. The text and structure of the governing provisions reveal that the penalties were designed solely to deter and to achieve retribution — not for "remedial" purposes. Indeed, there are entirely separate sections of the statute that authorize injured parties to sue violators for any damages resulting from violations. Turning from the underlying statute to the particular sanctions in this case reenforces the conclusion that the money penalties were punitive. The agency based its decision to impose the money penalties on a host of factors — such as willfulness, intent, concealment, and prior bad acts — that traditionally are associated with punitive, not "remedial," purposes.

Nor were the money penalties "remedial" simply because they happened to approximate the government's investigative costs in this case. In the first place, the penalties were paid to the United States Treasury, not to the allegedly injured banks, and thus they were not "remedial" in any conventional sense of the term. In any event, the sanctions in this case were not designed, either by Congress or by the agency, to compensate the government for its investigative costs. That rationale was simply the after-the-fact contrivance of a federal prosecutor seeking to overcome a double jeopardy challenge.

B. It does not matter for double jeopardy purposes that the civil case came first and the criminal case came second, rather than vice versa. *Halper* held that a civil sanction can (in some cases) violate the Double Jeopardy Clause. This must be because the action seeking the civil sanction places the defendant in "jeopardy." And whether that civil "jeopardy" comes first or second cannot possibly make a difference. The government's contrary view has been rejected by every court to have considered it and cannot withstand analysis.

C. Both the civil sanctions and the indictment in this case were for "the same offense." First, this Court's double

jeopardy cases involving consecutive civil and criminal proceedings have invariably articulated a "same conduct," not "same elements," standard in describing whether the offenses are the same. And there is no dispute that the indictment charges petitioners with exactly the same conduct for which they were previously sanctioned civilly. But even under the "same elements" test articulated in *Blockburger* the misapplication and conspiracy counts must be dismissed. Under this Court's cases, the *Blockburger* analysis must focus on the government's actual prosecution of the defendant — not some theoretical prosecution the government might someday pursue. Here, the civil sanctions rested on a finding of elements that are entirely sufficient to prove the misapplication and conspiracy charges as well. Accordingly, those counts in the indictment are "the same offense" for purposes of double jeopardy protections.

ARGUMENT

PETITIONERS' CRIMINAL PROSECUTION IS BARRED BY THE DOUBLE JEOPARDY CLAUSE

A. The Civil Sanctions Imposed On Petitioners Constituted "Punishment" For Purposes Of The Double Jeopardy Clause

Petitioners were assessed $200,000, and ultimately paid some $44,000, in money penalties. These sums were paid *not* to the banks (which suffered the alleged injury in this case) but to the United States Treasury (which did not). In the court of appeals' view, those penalties were nevertheless "remedial" because they were not "gross[ly] disproportionate" to the government's cost of investigating the case. This Court, however, has never found a money penalty to be "remedial," absent an actual injury to the government, merely because the government incurred some expense in investigating injuries sustained by *other* parties. And even if covering the government's investigative costs *could* be deemed

"remedial," the actual purpose for imposing the money penalty sanctions in this case was unmistakably punitive. Indeed, there is no reason to believe that the money penalties imposed on petitioners had *any* remedial purpose, much less that they were "solely" remedial, as *Halper* requires. As such, the money penalty component of the civil sanctions in this case was punitive, at least in part.

1. Under this Court's cases, a civil penalty constitutes "punishment" for double jeopardy purposes if a "particularized assessment" of the penalty reveals that its "actual" purpose is not to remedy an injury to the government but rather to deter or to provide retribution

a. This Court's cases make clear that money penalties, even when denominated "civil," may nevertheless constitute punishment for double jeopardy purposes where their actual purpose is not remedial, but is instead to provide deterrence or retribution. As the Court explained in *United States* v. *La Franca*, 282 U.S. 568, 573 (1931) (emphasis added), "[t]he term 'penalty,' involves the idea of punishment, *and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.*" Where money penalties are imposed, not to remedy an injury to the government, but simply as "an exaction imposed by statute as punishment for an unlawful act," a "grave constitutional question" (*id.* at 572) may be presented by successive proceedings.[8]

One of the earliest applications of this principle was in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938). There, the Court upheld against a double jeopardy challenge the imposition of a penalty for tax evasion equal to 50% of the taxes owed.

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[8] See also *United States* v. *Ursery*, 116 S. Ct. 2135, 2142 (1996) ("*in rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties").

The Court found that the penalty was remedial, and not punitive, because it was "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401. In light of this plainly remedial purpose — to safeguard the government's revenue collections and to cover the related enforcement costs — the Court held that the Double Jeopardy Clause did not apply.

The Court reached a like result in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), in which the question was whether the Double Jeopardy Clause barred a civil *qui tam* action following a conviction for the same underlying conduct. The Court explained (*id.* at 548-549) that there is a "line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." "Only the latter," the Court stated, "subject the defendant to 'jeopardy' within the constitutional meaning." *Id.* at 549. Applying that distinction, the Court held that the *qui tam* lawsuit was remedial because the "payment of a lump sum and double damages" would not "do more than afford the government complete indemnity for the injuries done it." *Ibid.* Looking both to the text of the underlying statute (*ibid.*), as well as to its legislative history (*id.* at 552), the Court concluded (*id.* at 551-552) that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."

The same held true in *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148 (1956). The question in *Rex Trailer* was whether the Double Jeopardy Clause barred a civil action to recover money penalties under the Surplus Property Act of 1944 following the defendant's conviction for fraudulently purchasing surplus government trucks. The Court held that

the Double Jeopardy Clause was not implicated because the civil action was remedial in nature. "It is obvious," the Court stated, "that injury to the Government resulted from [petitioner's] fraudulent purchase of trucks." *Id.* at 153. And while "[t]he damages resulting from this injury may be difficult or impossible to ascertain, * * * it is the function of liquidated damages to provide a measure of recovery in such circumstances." *Id.* at 153-154.

b. In *Mitchell*, *Hess*, and *Rex Trailer*, the Court was careful to note that the sanction was actually designed to remedy an injury to the government, together with the enforcement costs associated with that injury. By contrast, however, when a money penalty is *not* designed to remedy an injury to the government, but instead is intended to serve the purposes of deterrence or retribution, the Court has made clear that it constitutes punishment. The Court made that point, in a related context, in *Helwig* v. *United States*, 188 U.S. 605 (1903). Appellants in that case had been assessed extra customs duties for failing to declare the full value of certain merchandise. They contested the jurisdiction of the Circuit Court on the ground that the extra duties were penal, not revenue-raising in nature, and that jurisdiction over the matter therefore lay in the District Court. This Court held that the extra duties were indeed penal. The Court pointed out that the loss to the government through the undervaluation was a mere $354, and yet the extra duties amounted to $9067.68. As such, the Court observed (*id.* at 611), the extra duty "is without doubt a punishment upon the importer * * *. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character." Accord, *La Franca*, 282 U.S. at 572.

This Court's unanimous decision in *Halper* reaffirms the proposition that a money penalty not designed and fairly apportioned to remedy a harm to the government constitutes punishment for double jeopardy purposes. Halper was the target of a civil False Claims Act (31 U.S.C. 3729-3731)

lawsuit following his prosecution, conviction, and sentencing on 65 counts arising from false reimbursement claims he had submitted to the United States. Although the false claims had caused a loss to the United States of only $585, in the subsequent civil action Halper was subject to a statutory penalty of more than $130,000. The question presented in *Halper* was "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. The Court unanimously held that it could.

The Court began by rejecting the government's contention that a sanction could be punitive only if Congress expressly said that it was. 490 U.S. at 447. The Court explained that "while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Ibid.*[9] "This constitutional protection," the Court emphasized, "is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Ibid.*

A civil sanction constitutes punishment, the Court stated, "when the sanction as applied in the individual case serves the goals of punishment." 490 U.S. at 448. In particular, the Court held (*ibid.* (emphasis added)):

[9] See also *Breed* v. *Jones*, 421 U.S. 519, 528 n.10 (1975) ("Distinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses * * * have not similarly confined the protection of the Double Jeopardy Clause").

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> a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

In view of the "disproportionate" relationship between Halper's potential civil penalty and the apparent losses and costs to the government arising from Halper's conduct, the Court concluded (*id.* at 452) that the civil sanction might well constitute punishment. It remanded the case to afford the government an opportunity to show that its actual costs were higher than the district court had surmised. *Ibid.*

c. This Court's money penalty cases stand for four principles that should control the present case. *First* and foremost, there is a dividing "line," as the Court explained in *Hess* (317 U.S. at 548), between *remedial* penalties (that do not implicate double jeopardy) and *punitive* penalties (that do). "[R]emedial actions," the Court made clear (*id.* at 548-549), are those that are "brought primarily to protect the government from financial loss," whereas penalties constitute punishment when they seek "to vindicate public justice." True, a penalty may be remedial even when it includes an extra component to account for the costs of investigation and enforcement. But in each case in which the Court has found money penalties to be remedial, the Court was able to discern from the statute, and from the particular facts of the case, that the penalty actually served to "afford the government complete indemnity for the *injuries* done it." *Id.* at 549 (emphasis added).

Second, in deciding whether a particular sanction is truly remedial, courts are not free simply to imagine remedial purposes that might plausibly be ascribed, after-the-fact, to the sanction imposed. Rather, based on the underlying statute, and "a particularized assessment of the penalty imposed" (*Halper*, 490 U.S. at 448), they must determine "the goal" of the penalty (*id.* at 451) and decide whether that goal is remedial or punitive. The question in each case is whether the

penalty was "motivated by penal * * * intent" and thus "intended for punishment." *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. at 779 nn. 16-19 (1994). And as the Court held in *Halper*, "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes *actually served* by the sanction in question * * * that must be evaluated." *Halper*, 490 U.S. at 447 n.8 (emphasis added). Only be assessing "the purposes that the penalty may *fairly be said to serve*" can courts make "the determination whether a given civil sanction constitutes punishment in the relevant sense" (*id.* at 448) (emphasis added).

Third, a sanction may be punitive, at least in part, even if it also serves some remedial purpose. As the Court in *Halper* put it (490 U.S. at 448): "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Thus, the Court held (*id.* at 448-449), a civil sanction that is remedial in part is nevertheless punitive "to the extent" that it "may not fairly be characterized as remedial, but only as a deterrent or retribution." See also *Austin* v. *United States*, 509 U.S. 602, 610 (1993) (so long as a civil sanction "can only be explained as serving in part to punish," it must be regarded, at least to that extent, as punishment).

Finally, in making assessments of the purpose of the sanction, it is not enough to examine the underlying statute in the abstract. Rather, because "[t]his constitutional protection is intrinsically personal" (*Halper*, 490 U.S. at 447), courts must make a "case-by-case" (*Ursery*, 116 S. Ct. at 2145) evaluation, engaging in what the Court called in *Halper* (490 U.S. at 448) "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." Even an avowedly civil sanction may constitute punishment "when the sanction *as applied in the individual*

case serves the goals of punishment." *Ibid.* (emphasis added). Courts must therefore examine, not only the organic statutes, but also "the character of the actual sanctions." *Id.* at 447. Accord *Kurth Ranch*, 511 U.S. at 779.

2. Applying these principles, there is no doubt that the civil sanctions imposed on petitioners constituted punishment for double jeopardy purposes

There is simply no question that the civil sanctions imposed in this case crossed the "line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *Hess*, 317 U.S. at 548-549. To say the least, the sanctions "cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes." *Halper*, 490 U.S. at 448 (emphasis added). Indeed, apart from the late-blooming "investigatory costs" theory, the government has not identified *any* remedial purpose that was served by the money penalties imposed on petitioners.

It is important to emphasize that there were two distinct civil sanctions in this case — prohibition orders and money penalties. Although the court of appeals analyzed the prohibition orders separately from the money penalties (see Pet. App. 75a-81a), petitioners were in fact subjected to *both* sanctions. The question whether the money penalties constituted punishment (at least in part) cannot be answered without taking into account that petitioners were also banned from the industry. A "particularized assessment" of the *entire* civil sanction in this case reveals that the money penalty portion was clearly, indeed starkly, punitive.

a. Petitioners were subjected to money penalties under 12 U.S.C. §§ 93(b) and 504 and a prohibition from further participation in insured banks under 12 U.S.C. 1818(e).

Sections 93(b) and 504 are denominated "civil *penalty*" provisions, and the very use of that term suggests, at a minimum, the possibility that punishment may be at work. As this Court pointed out just last year, "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States* v. *Reorganized CF & I Fabricators of Utah, Inc.*, 116 S. Ct. 2106, 2113 (1996). Or, as the Court put it in *La Franca* (which expressly addressed double jeopardy concerns), "a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." 282 U.S. at 572.

The text of the penalty provisions confirms that punishment is indeed the purpose of the penalties. Sections 93(b) and 504 each provide that the Comptroller of the Currency "shall" impose a penalty of not more than $1,000 per day on account of certain prescribed violations of law. Tying the payment of a penalty to the commission of "illegal conduct" may not be dispositive of "penal" intent, but it is assuredly a strong indicator of it. *Kurth Ranch*, 511 U.S. at 782; *United States* v. *Constantine*, 296 U.S. 287, 295 (1935). Particularly where, as here, the identical conduct is in fact (and indeed is being prosecuted as) a crime, the tie between the money penalties and the unlawful conduct strongly indicates a punitive intent. See also *Kansas* v. *Hendricks*, No. 95-1649 (June 23, 1997), slip op. 14 (commitment statute "is not retributive because it does not affix culpability for prior criminal conduct"); *Austin*, 509 U.S. 602; *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965).

What is more, the money penalties are paid, not to "remedy" any injury to the affected banking institution, but "into the Treasury of the United States." 12 U.S.C. §§

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93(b)(8), 505(7).[10] Indeed, there are entirely separate sections of the relevant statutes that explicitly provide for compensation to the injured institutions. Sections 93(a) and 503 authorize damages actions against directors (under Section 93(a)) and officers (under both provisions) "for all damages" arising from specified violations, including violations of Sections 84 and 375b. These truly "remedial" provisions entitle the institution, its shareholders, and "any other person" who "shall have sustained [damages] in consequence of such violation" to sue the directors and officers in their "personal and individual capacity." 12 U.S.C. §§ 93(a), 503. Sections 93(a) and 503 are quite broad: they may be invoked by a receiver for an insolvent bank (*Briggs* v. *Spaulding*, 141 U.S. 132 (1891)), by the bank itself (*Yates* v. *Jones National Bank*, 206 U.S. 158 (1907)), by a potential investor (*Thomas* v. *Taylor*, 224 U.S. 73 (1912)), and by depositors or other creditors (*Chesbrough* v. *Woodworth*, 244 U.S. 72 (1917)). If, in fact, the government truly sustained a "loss" on account of petitioners' conduct, presumably Sections 93(a) and 503 would provide a damages remedy. But the government did not invoke those sections. Instead, it sought money penalties under Sections 93(b) and 504. The very fact that there are broad and explicitly remedial provisions *elsewhere* in the statute suggests that the money penalties in Sections 93(b) and 504 serve a different function — deterrence or retribution, "the twin aims" of punishment. *Halper*, 490 U.S. at 448. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

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[10] Cf. *Hicks* v. *Feiock*, 485 U.S. 624, 632 (1988) (a fine assessed in a contempt proceeding "is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order").

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

In addition, in setting the "amount of the penalty" Sections 93(b)(2) and 504(b) direct the Comptroller to consider a range of factors, none of which involves the costs (investigative or otherwise) sustained by the government. In particular, the Comptroller is required to "take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the * * * person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require." Not only are these factors wholly unrelated to the government's costs, they are in fact among the most traditional factors bearing on the appropriate level of *punishment*.[11] Indeed, each of these factors is a ground for calculating criminal punishment under the Sentencing Guidelines. See, *e.g.*, U.S.S.G. § 5E1.2(d)(2) (in setting fine,

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[11] See, *e.g.*, *Bearden* v. *Georgia*, 461 U.S. 660, 669-670 (1983) ("the sentencing court can consider the entire background of the defendant, including his * * * financial resources"); *San Antonio Indep. Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 22 (1973) (in setting criminal fines, "[s]entencing judges may, and often do, consider the defendant's ability to pay"); *Enmund* v. *Florida*, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to 'the degree of [his] criminal culpability'"); *United States* v. *Grayson*, 438 U.S. 41, 46 (1978) ("[e]ach particular offense [is] to be punished in proportion to the social harm caused by it"); *Witte* v. *United States*, 115 S. Ct. 2199, 2205-2206 (1995) (an enhanced penalty because of earlier offenses is simply "'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'"); *Nichols* v. *United States*, 511 U.S. 738, 742 (1994) ("[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior").

court "shall consider * * * the defendant's ability to pay the fine"); *id.* § 4A1.1 (augmenting sentence based on prior sentences of imprisonment); *id.* § 2F1.1 (augmenting sentence for fraud and deceit based on amount of losses caused); *id.* at 2Q1.2 Application Note 4 (downward departure may be warranted where conduct was not knowingly performed).[12]

In short, the text and structure of Sections 93(b) and 504 demonstrate that the money penalties were not intended to be remedial, but rather were designed wholly to deter or for retribution. And the legislative history confirms the point. As explained in the House Report accompanying the Financial Institutions Regulatory Act of 1978, "[d]aily money penalties should serve as deterrents to violations of laws, rules, regulations, and orders of the agencies." H.R. Rep. No. 95-1383 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9289. Money penalties, the Congress concluded, "give an agency the flexibility it needs to secure compliance by individuals or institutions." *Ibid.*

b. Turning to the case-specific analysis required by *Halper*, "the character of the actual sanctions" (490 U.S. at 447) in this case makes clear that petitioners suffered punishment in the civil proceedings. The Comptroller made his initial penalty assessments only after determining — in accordance with the CMP Matrix — that petitioners had acted "willfully"; that they had received a prior warning; that they had engaged in repeated similar violations; that they had caused a large actual or potential loss; that they had "purposely complicated [the] transaction[s] to make [them]

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[12] The Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) authorizes imposition of civil penalties upon essentially identical considerations (see *id.* § 666(a)). And as the Seventh Circuit recently held: "[a] fine thus derived is not 'related to the goal of making the government whole.'" *S.A. Healy Co.* v. *OSHRC*, 96 F.3d 906, 910 (1996), pet. for cert. pending, No. 96-1299.

difficult to uncover"; that they had failed to make restitution; that they had acted intentionally and not in good faith; and that they had offered virtually no cooperation. Ex. 4. As noted above (*supra* at 23-24), these are some of the most basic factors in determining punishment.[13] By contrast, the Comptroller gave no apparent consideration to the losses (if any) sustained by the government. That factor was never even mentioned.

But there is more. Petitioners were not simply sanctioned monetarily; they were also banned from the banking profession. This "prohibit[ion] [on] further participation" (Pet. App. 99a, 109a, 119a) was all the "specific deterrence" the agency could ask for; without the agency's "prior written consent" (*id.* at 131a) none of the petitioners could work in the industry at all, much less commit any new violations. Thus, so far as specific deterrence is concerned, the money penalties were utterly superfluous. Their imposition could have no purpose other than to exact retribution from petitioners and to deter others by example. That is the very essence of punishment.

On this record, it cannot plausibly be said, in the words of *Halper*, that the sanctions were designed "*solely* to serve a remedial purpose." 490 U.S. at 448 (emphasis added). Indeed, there is nothing in the record to suggest that the civil money sanctions imposed on petitioners had *any* remedial purpose. At a minimum, however, the money penalties, imposed on top of the lifetime debarments, served, at least in part, "retributive or deterrent purposes," and was therefore "punishment, as we have come to understand the term." *Ibid.*

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[13] In addition to the authorities cited at page 24 *supra*, see also *Roberts* v. *United States*, 445 U.S. 552, 557 (1980) (failure to cooperate and efforts at concealment may be considered in setting the level of punishment).

3. Even if the government's enforcement costs happen to approximate the money penalties ultimately imposed in this case, that would not render the civil sanctions "remedial" for double jeopardy purposes

The court of appeals rejected petitioners' double jeopardy challenge because, in its view (Pet. App. 4a), the civil sanctions bore "a rational relation to the goal of compensating the government for its loss." In particular, the court observed (*ibid.*), "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000." The court therefore concluded (*id.* at 6a) that "the sanctions can 'fairly be characterized as remedial.'" The court's analysis is flawed at every turn.

a. In the first place, the court misunderstood what it means to be "remedial." As Judge Easterbrook explained in *S.A. Healy Co.* v. *OSHRC*, 96 F.3d 906, 910 (7th Cir. 1996) (emphasis in the original), simply recovering investigative and enforcement costs "cannot be *remedial*, because the United States is not the injured party, and the fine produces no benefit for those who were injured — except through general and specific deterrence, the standard objectives of the criminal law." A "remedial" monetary sanction, by contrast, is one that compensates a victim for injury caused by the defendant's unlawful conduct. It is imposed for the purpose of restoring the victim to the position he would have occupied had the improper conduct not occurred — or, put another way, for the purpose of making the victim whole. See *Halper*, 490 U.S. at 449 (noting the "remedial purpose" of "a civil sanction" of "making the Government whole" in a case in which the Government was the injured party). Cf. *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974) (an injunctive decree is "remedial in nature" if it is "designed as nearly as possible 'to restore the victims of [unlawful] conduct to the position they would have occupied in the absence of such conduct'"). In this case, the government's expenditure on law enforcement is not an

injury against which the underlying statute is designed to protect and the sanctions imposed for its violation accordingly cannot be viewed as "remedial." Cf. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 9-10 (1940) (sanctions imposed "for the purpose of redressing, not an injury to [the persons harmed by defendant's wrongful conduct], but an injury to the public" are punitive, not remedial).

The notion that it is "remedial" and not "punitive" to shift to the alleged offender the government's enforcement costs is also inconsistent with our common law traditions. "[T]he underlying rationale of fee-shifting is, of course, punitive." *Hall* v. *Cole*, 412 U.S. 1, 5 (1973). As the Court explained in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), parties in this country are usually expected to bear their own costs and attorneys' fees in litigating a matter. In the absence of a statute that makes "specific and explicit provision[] for the allowance of attorneys' fees" (*id.* at 260), the "American Rule" permits fee-shifting only for punitive purposes: "for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant'"; and "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" (*id.* at 258-259). See also *Chambers* v. *Nasco*, 501 U.S. 32, 53-54 (1991). It would be an abrupt departure from this common law tradition to treat as "remedial" a money penalty scheme whose only evident "remedy" is to reimburse the government for the cost of litigating the case. Cf. *Isbandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident").

To be sure, this Court has stated that money penalties may be remedial even when a *portion* of the recovery serves to reimburse the government for its "*ancillary* costs, such as the costs of detection and investigation, that routinely attend

the Government's efforts to root out deceptive practices directed at the public purse." *Halper*, 490 U.S. at 445 (emphasis added). But this case does not involve "practices directed at the public purse" (see *S.A. Healy*, 96 F.3d at 909-910), nor is there anything "ancillary" about the government's costs in this case. On this record, it is extremely doubtful that the government may be said to have proven *any* "loss." Assuming that it did, however, the government assuredly proved no loss *other* than the cost of investigation. Yet in each and every case in which this Court has sustained a civil sanction as "remedial," it did so *only* after first concluding that the sanction was designed, in the words of the *Hess* case, to "afford the government complete indemnity for the injuries done it." 317 U.S. at 549. See also *Mitchell*, 303 U.S. at 410; *Rex Trailer*, 350 U.S. at 153. Conversely, the Court has never, to our knowledge, sustained as "remedial" a sanction that did not actually "remedy" a harm to the government, but merely covered the costs of investigating *harms caused to other parties*. Such investigations, the Court observed in *Hess*, are "intended to * * * to vindicate public justice," and as such "subject the defendant to 'jeopardy' within the constitutional meaning." *Id.* at 549.

Moreover, treating money penalties as non-punitive simply because they do not exceed the government's enforcement costs proves too much. Even fines imposed in criminal cases may be (and frequently are) lower than the costs incurred by the government in investigating and prosecuting the case. This is often true where a "small-gauge offender" (*Halper*, 490 U.S. at 449) has become embroiled in a major criminal investigation, and the government's costs therefore vastly exceed the fines that are ultimately imposed on the individual defendant. But simply because those fines do not exceed the government's costs (however calibrated) cannot possibly alter the punitive nature of the fine. As Judge Easterbrook put the matter in *S.A. Healy* (96 F.3d at 910): "If we were to treat deterrence (and the costs of achieving it) as

'remedial,' then the entire criminal apparatus would be remedial."

Finally, courts have no basis for treating as "damages" to the government the payment of salaries that the government is contractually bound as an employer to pay in any event. Cf. Restatement of the Law (Second) Contracts § 73 (1981) ("[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration"). As the facts of this case make clear, such a measure of "damage" positively invites unprincipled, after-the-fact manipulation. The Ninth Circuit's decision in *United States* v. *Walker*, 940 F.2d 442 (1991), illustrates the arbitrariness inherent in this approach. The defendant in that case entered the United States without declaring that he was in possession of one gram of marijuana. For this offense he was fined $500 by the Customs Service and was thereafter indicted for marijuana possession. The panel majority rejected the defendant's double jeopardy claim, taking "judicial notice" of the costs to the government "associated with maintaining check points and administering the customs system." *Id.* at 444. Dissenting, Judge Noonan asked (*ibid.*):

> [W]hy should a *pro rata* share of the customs inspection system be a measure? There would be no customs inspection system without the Department of the Treasury. Should not a *pro rata* share of Treasury expense be the measure? There would be no Treasury without the government as a whole. Should not a *pro rata* share of the expense of the government as a whole be the measure?

b. But even if it were "remedial" simply to reimburse the government for its investigative costs, there is absolutely no evidence to suggest that "the goal" (Pet. App. 4a) of the sanctions in this case was to do so. To the contrary, every indication — from the text of the statute, from its legislative history, and from the actual enforcement proceedings in this

case — confirms that the money penalties were intended solely to deter other potential offenders and to provide retribution. And "it is the purposes *actually served* by the sanction in question * * * that must be evaluated" (*Halper*, 490 U.S. at 447 n.7 (emphasis added)), not some rationalization that a prosecutor invents after the fact. Only by assessing "the purposes that the penalty may *fairly be said to serve*" can courts make "the determination whether a given civil sanction constitutes punishment in the relevant sense" (*id.* at 448 (emphasis added)).

Were the rule otherwise, there would not be "much left of the double jeopardy clause." *S.A. Healy Co.*, 96 F.3d at 910. As Judge Easterbrook observed in rejecting the contention that covering investigative costs is "remedial" for double jeopardy purposes (*ibid.*):

> Additional federal agencies furthering their own agendas may conduct their own investigations. The multiplying costs of the investigations become the justification for still more proceedings and the imposition of additional fines. [Petitioners] could be dogged for eternity by additional penalties for the same misconduct. This the double jeopardy clause does not allow.

The present case illustrates the vagaries that the court of appeals' ruling would permit. The "goal" of compensating the government for its investigative costs was the furthest thing from the agency's mind when it imposed the sanctions in this case. Indeed, Daniel Stipano, the Assistant Director of the Enforcement and Compliance Division of the OCC, acknowledged that the agency made its initial penalty assessment of $100,000 for Hudson and $50,000 for Rackley and Baresel — which turned out to be exactly the assessments that the agency ultimately recommended — *before most of the investigative and enforcement costs were even incurred.* Pet. App. 40a-42a. The costs could not and did not enter into the analysis. And the decision to settle the case on reduced terms

was "primar[il]y" due, not to cost factors, but for a reason that traditionally affects the level of criminal fines: Petitioners simply "had no money." *Id.* at 31a-32a.

So far from his mind was any concern over government costs that Stipano conceded he had no idea why he had even been asked to compile the data regarding the government's costs. Pet. App. 38a. And none of the criteria by which the fine was calculated had anything to do with the government's costs. Even the after-the-fact calculations of government "costs" were largely contrived — essentially a loose amalgam of fractions of annual salaries, with a dash of "benefits" such as "health care" thrown in. Pet. App. 40a. It trivializes this Court's double jeopardy jurisprudence to suggest that the constitutional guarantee against multiple punishments may be rendered ineffectual by such minutia.

The short of the matter is this: The money penalties in this case were designed only for deterrence and retribution, "the two primary objectives of criminal punishment." *Kansas* v. *Hendricks*, slip op. 14. The government decided to impose the penalties only after making findings of willfulness, concealment, and wrongdoing that are the very hallmarks of punishment. See *S.A. Healy*, 96 F.3d at 910-911. Conversely, the goal of reimbursing the government for its costs — which is not a "remedial" goal in any event — never entered the agency's mind. Neither was it any part of the congressional design in enacting the money penalty provisions. Taken as a whole, the civil sanctions in this case — the imposition of money penalties, plus a lifetime bar from participating in insured banking institutions — easily qualifies as punishment for double jeopardy purposes.

B. For Purposes Of The Double Jeopardy Clause, It Does Not Matter That Petitioners Were Subject To Civil Sanctions Before They Were Subject To Criminal Prosecution, Rather Than Vice Versa

The government contended in its Response to the Petition (at 13 & n.4) that the protections of the Double Jeopardy Clause "may not properly be invoked by a defendant who merely claims that he was previously subjected to a punitive *civil* sanction." In the government's view, "a purportedly punitive civil sanction" simply may not "bar a subsequent criminal prosecution or punishment." *Id.* at 13. Accordingly, because petitioners suffered the civil sanctions first and the prosecution second — rather than the other way around — the government would deny them the protections of the Double Jeopardy Clause.

This contention, which the government did not raise below, makes no sense at all. By its terms, the Double Jeopardy Clause is violated when a person is "twice put in jeopardy." If, as *Halper* and *Kurth Ranch* held, a civil sanction imposed *after* a criminal sanction can violate the Doubler Jeopardy Clause, that can only be because the civil proceeding constitutes a second — *i.e.*, a "double" — jeopardy. Accordingly, as Justice Scalia noted in his dissent in *Kurth Ranch*, "if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." 511 U.S. at 803. See also *Ursery*, 116 S. Ct. at 2161 (Stevens, J., concurring in the judgment in part and dissenting in part). To our knowledge, every circuit to have addressed this issue has reached the same conclusion.[14]

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[14] See, *e.g.*, *United States* v. *Stoller*, 78 F.3d 710, 717 (1st Cir.) ("as long as a civil sanction constitutes punishment in the relevant sense, it does not matter if the 'multiple' punishment — presumably a criminal sentence — precedes the attempt to impose the sanction, or conversely, if the sanction precedes the attempt to

Neither *Halper*, *Kurth Ranch*, nor any other decision of this Court contains a trace of the government's theory — that there is a "double" jeopardy only when the prosecution comes first. To be sure, the Court stated in *Halper* (490 U.S. at 448-449) "that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." But that was simply a statement of the facts of *Halper*; there is no indication whatsoever that the Court was suggesting that double jeopardy protections apply *only* when the prosecution comes first. After all, if an *initial* civil proceeding cannot pose a *single* jeopardy, how can a *subsequent* civil action ever present a *double* jeopardy?

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convict the defendant"), cert. dismissed, 117 S. Ct. 378 (1996); *United States* v. *Sanchez-Esacareno*, 950 F.2d 193, 200 (5th Cir. 1991) ("the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding"), cert. denied, 506 U.S. 841 (1992); *United States* v. *Mayes*, 897 F.2d 1126, 1127 (11th Cir.) ("the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment"), cert. denied, 498 U.S. 865 (1990); *United States* v. *Morgan*, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995); *United States* v. *Williams*, 56 F.3d 63 (4th Cir. 1995); *United States* v. *Tilley*, 18 F.3d 295, 298 n.5 (5th Cir.), cert. denied, 513 U.S. 1015 (1994); *United States* v. *Austin*, 54 F.3d 394, 399 (7th Cir. 1995); *United States* v. *Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990). But cf. *United States* v. *Newby*, 11 F.3d 1143, 1145 (3d Cir. 1993) (suggesting, without deciding, that a case in which the civil penalty preceded the criminal penalty might be distinguishable from *Halper*).

Kurth Ranch also significantly undercuts the government's "order is everything" theory. 511 U.S. 767. In that case, the Court invalidated, on double jeopardy grounds, a Montana tax on the possession of illegal drugs that followed upon a criminal penalty for drug offenses. As in *Halper*, the civil sanction happened to follow the criminal penalty; but nowhere did the Court place any weight on that fact. To the contrary, the Court focused on the features of the tax proceeding itself and concluded (*id.* at 784) that the proceeding was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense.'" If anything, then, *Kurth Ranch* sets forth precisely the proposition the government denies: that, when the government seeks and obtains a civil sanction, the defendant may be placed in "jeopardy" sufficient to trigger double jeopardy protections.

In short, *Halper* and *Kurth Ranch* stand for the proposition that, under appropriate circumstances (490 U.S. at 449), a civil sanction may give rise to jeopardy. Whether it comes first or second cannot possibly make a constitutional difference.[15]

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[15] Ironically, the government itself has recognized the same point. In its amicus brief in *United States ex rel. Marcus* v. *Hess*, Nos. 173, 236 (Oct. Term 1942), the government urged this Court to conclude that a civil false claims action and a criminal action are different offenses for double jeopardy purposes. A contrary ruling, the government explained, "might entail severe and unfortunate consequences" for "the enforcement of the criminal law by public officials." Am. Br. 48. This was so, the government continued, because "the principle of double jeopardy works both ways. If the suit for penalties is regarded as sufficiently punitive to be barred by prior criminal proceedings, *a criminal prosecution would be barred if the penalty suit were brought first.*" *Ibid* (emphasis added). We agree with Solicitor General Fahy.

C. Petitioners Are In Jeopardy Of Being Punished Twice For "The Same Offense"

Finally, the government asserted in its Response to the Petition (at 14 & n.5) that under the "'elements test'" set forth in this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), "the banking violations that formed the basis for the sanctions assessed against petitioners are not 'the same' as the offenses charged in the indictment — conspiracy, misapplication of bank funds, and making false entries." In particular, the government stated, "[e]ach of the criminal offenses requires proof of (at least) one element not required by the civil charges, and vice versa."

For two independent reasons, that contention is incorrect. First, this Court's double jeopardy cases involving consecutive civil and criminal proceedings have stated, not the "elements test" under *Blockburger*, but rather a "same conduct" formulation. In fact, several of those cases would not likely have come out as they did had a strict elements test been applied. Under a "same conduct" test, the indictment charges petitioners with the same offenses for which they were sanctioned in the civil proceedings.

In any event, even if *Blockburger* controls, the misapplication and conspiracy offenses in the indictment are the same as those for which petitioners were civilly sanctioned. Under this Court's cases, the elements test under *Blockburger* must focus on the government's actual proceedings against petitioners, not the proceedings that it could, as a theoretical matter, have pursued. Here, the elements underlying the judgment in the civil case, and essential to the sanctions that were imposed on petitioners, were entirely sufficient to prove all but the false entry charges as well.

1. This Court has articulated a "same conduct" (not "same elements") standard in double jeopardy cases arising from consecutive civil and criminal proceedings

a. The Court's cases involving consecutive civil and criminal proceedings do not support the government's contention that *Blockburger* controls the question whether the "same offense" is being twice punished. To the contrary, the Court has articulated a "same conduct" or "same transaction" standard in describing offenses such as those here at issue.

Thus, for example, in stating the implications of its holding in *Halper*, the Court explained (490 U.S. at 451) (emphasis added): "[T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action *based on the same conduct* and receive a judgment that is not rationally related to the goal of making the Government whole." Indeed, each time the Court described the separate proceedings in *Halper* it did so using the formulation "same conduct." See *id.* at 441 (the parties do not "dispute that the instant proceeding and the prior criminal proceeding concern the same conduct, the submission of 65 false claims"); *id.* at 450 ("Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive").

In *Kurth Ranch*, the Court reiterated that formulation. In stating the question presented at the outset of the decision, the Court said (511 U.S. at 769) (emphasis added): "This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty *for the same conduct* may violate the constitutional prohibition against successive punishments for the same offense."

The Court used much the same formulation in *United States* v. *La Franca*, 282 U.S. 568 (1931), a unanimous

decision that was handed down only one year before *Blockburger* itself. The question in *La Franca* was whether a federal statute should be construed to permit the government to sue to collect taxes and penalties on the sale of alcoholic beverages, following the defendant's conviction for having made the same sales. The Court construed the statute to prohibit the lawsuit. In doing so, however, the Court made clear that its construction was virtually compelled by double jeopardy principles. The Court framed the question presented in these terms (*id.* at 573) (emphasis added):

> Respondent already had been convicted and punished in a criminal prosecution *for the identical transactions set forth as a basis for recovery in the present action.* He could not again, of course, have been prosecuted criminally for the same *acts*. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

The Court concluded that the nominally civil nature of the proceeding did not alter the "essential nature" of the tax as punitive. Because the tax proceeding and the prior prosecution involved "the same acts," the Court felt constrained to interpret the statute to preclude the tax proceeding.

b. Nor would the Court's articulation of a "same conduct or transaction" standard appear to be inconsequential. In reaching its decision in *La Franca*, the Court relied prominently (282 U.S. at 574) on Circuit Justice Miller's decision in *United States* v. *McKee*, 26 F. Cas. 1116 (Circuit Ct. E.D. Mo. 1877). In *McKee* the Circuit Court held that the Double Jeopardy Clause barred a civil action to recover double the amount of taxes of which the government had been defrauded through defendant's aiding and abetting, following the defendant's conviction for conspiracy to defraud the United States. Strictly speaking, of course, conspiracy and aiding and abetting are distinct offenses; yet, taking a

functional approach, the Court held that conspiring to defraud the government is one of the "the safest and surest means" of aiding and abetting the result. Thus, the Court concluded (*id.* at 1117), "if the specific acts * * * on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action." Moreover, in describing the holding in *McKee*, the Court in *La Franca* stated that double jeopardy principles had been applied in that case because "the transactions" in both the civil and criminal proceedings had been "the same." 282 U.S. at 574.

The same holds true of *Halper*. The defendant in that case was convicted under the criminal false claims statute (18 U.S.C. § 287) and thereafter sued under section (a)(2) of the civil false claims statute (31 U.S.C. § 3729(a)(2)). To prove a criminal violation, the government was required to show that the defendant: (1) presented a false or fraudulent claim to any agency of the United States; and (2) knew such claim to be false or fraudulent. See, *e.g.*, *United States* v. *Ewing*, 957 F.2d 115, 119 (4th Cir. 1992), cert. denied 505 U.S. 1210. Thus, the criminal statute required the government to demonstrate that the defendant himself, or someone whose actions could be attributed to the defendant, submitted the false claim. The plain language of 31 U.S.C. § 3729(a)(2), the civil statute, would not appear to demand such a showing. To prove a civil violation, the government must establish (1) that the defendant made or used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved; (2) that the record or statement and the claim that it supported were both false or fraudulent; (3) that the defendant knew the record or statement and the claim it supported were false or fraudulent; and (4) that the United States suffered damages as a result of the false or fraudulent claim. See *Blusal Meats, Inc.* v. *United States*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986). A defendant violates the civil statute by knowingly preparing false supporting materials,

even if the defendant himself did not submit the false claim. The criminal provision does not require the defendant to have prepared the false record or statement. In short, each statute would appear, strictly speaking, to require proof of at least one element that the other does not.

The statutes in *Kurth Ranch* would also have failed to meet a strict "elements test." The defendants in that case pleaded guilty to and were punished for conspiracy to possess drugs with the intent to sell under MONT. CODE ANN. § 45-4-102 (1987). See *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994). In order to establish conspiracy under the Montana statute, the prosecutor had to show: (1) that the defendants made a knowing and purposeful agreement to commit a criminal offense; and (2) an act in furtherance of such agreement. See *State* v. *Houchin*, 235 Mont. 179, 181, 765 P.2d 178, 179 (1988). Subsequent to the plea bargain, the Department of Revenue attempted to tax the Kurth family under MONT. CODE ANN. § 15-25-101 *et seq.* (1987), which allowed the state to assess a tax against any person who (1) possessed (2) dangerous drugs. The tax statute required possession; the criminal conspiracy charge did not require that the defendants actually fulfill any of the underlying elements, such as possession, of the crime that they conspired to commit. See *Houchin*, 235 Mont. at 181, 765 P.2d at 179. The criminal statute required an agreement; the tax statute did not. The Court nevertheless held that double jeopardy barred the tax penalty.

Indeed, even when explicitly given the opportunity, the Court has declined to embrace an "elements test" in the context of consecutive civil and criminal proceedings. In *Hess*, the district court had rejected a double jeopardy claim on the ground that the prior criminal conviction had been on a charge of conspiring to defraud the United States, while the *qui tam* action alleged the substantive presentation of false claims. 41 F. Supp. 197, 210 (W.D.Pa. 1941). The Solicitor General urged this Court to affirm the judgment on that basis,

expressing concern that the Court would otherwise have to reach the "close" question whether damages awarded in a *qui tam* action are punitive in nature. U.S. Br. 59. This Court, however, did not accept the government's suggestion. To the contrary, in introducing the double jeopardy issue, the Court stated (317 U.S. at 548 (emphasis added)): "[R]espondents had previously been indicted and fined for defrauding the government in connection with *the same transactions* for which they are now being sued." The Court went on to hold that the *qui tam* action was remedial in nature.

2. In any event, even if *Blockburger* controls, the misapplication and conspiracy counts should be dismissed because they rest on the same elements that the government established in imposing the civil sanctions in this case

Even if *Blockburger* is the correct test in this context, the misapplication and conspiracy counts constitute the same offenses as those for which petitioners were already civilly sanctioned. In particular, the elements established by the government (on consent) in the civil proceedings were entirely sufficient to prove the misapplication and conspiracy charges as well.[16] True, the banking statutes do not *invariably* require proof of the same elements as do the criminal statutes. But in the circumstances of this particular case, the civil sanctions in fact rested on the same elements (not merely the same conduct) as the government would have to prove in the criminal case. And this Court's cases confirm that it is

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[16] It has been established since *United States* v. *Chouteau*, 102 U.S. 603 (1880), that a consent decree, or similar document, will support a claim of double jeopardy: "The compromise pleaded must operate for the protection of the [defendant] against subsequent proceedings as fully as a former conviction or acquittal." *Id.* at 611.

entirely appropriate to apply the *Blockburger* analysis at this "retail" level.

For example, in *Whalen* v. *United* States, 445 U.S. 684 (1980), the Court held that, under *Blockburger*, a defendant could not be separately punished for rape and for a felony murder based on killing the same victim in the perpetration of the rape. The government argued that the greater offense (there, felony murder) "does not in all cases require proof" of the lesser offense (there, rape); for example, the government noted, the predicate offense could just as easily have been robbery, kidnapping, or arson. *Id.* at 694. The Court rejected that argument. "*In the present case*," the Court explained, "proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." *Ibid.* (emphasis added).

The Court applied the same principle in *Illinois* v. *Vitale*, 447 U.S. 410 (1980). The question in *Vitale* was whether, under the Double Jeopardy Clause, a defendant's conviction for failing to reduce speed to avoid a collision precluded the State from prosecuting him for involuntary manslaughter arising from an automobile accident. The Court analyzed the question by focusing on the State's actual trial theory — not what elements the State *theoretically could* prove at a manslaughter trial, but what elements it *actually would* prove at *this defendant's* trial. See *id.* at 420. See also *Brown* v. *Ohio*, 432 U.S. 161 (1976); *Harris* v. *Oklahoma*, 433 U.S. 682 (1977).[17]

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[17] See also *United States* v. *Dixon*, 509 U.S. 688, 696-700 (1993) (Scalia, J., joined by Kennedy, J.) (where contempt sanction was based on violating the terms of a conditional release, and those terms prohibited violating any criminal law, defendant could not subsequently be prosecuted for violating the drug offense on which the contempt sanction has been based); *Payne* v. *Virginia*, 468 U.S. 1062 (1984) (conviction for robbery was barred under Double Jeopardy Clause where it followed conviction for capital murder committed during the perpetration of an armed robbery).

In the present case, the government sanctioned petitioners under 12 U.S.C. §§ 93(b) and 504 for violations of 12 U.S.C. § 84 (involving unsecured loans to any one borrower) and 12 U.S.C. § 375b (involving loans to insiders). The elements actually established (on consent) were that petitioners, as officers or directors of national and Federal Reserve member banks, intentionally engaged in a series of nominee loans, that they did so with a "willful and continuing disregard for [the] safety and soundness" of the banks, and that they "purposely complicated [the] transaction[s] to make [them] more difficult to uncover." See Ex. 4; J.A. 39; Pet. App. 118a. Those elements are entirely sufficient to establish misapplication under 18 U.S.C. § 656. To make its case under the Section 656 counts, the government would be required to prove, albeit beyond a reasonable doubt, exactly the same elements: (1) that the defendants were officers or directors of a federally insured or protected bank; (2) that they willfully misapplied the funds of the bank; and (3) that they did so with the intent to defraud the bank. See *e.g.*, *United States* v. *Haddock*, 961 F.2d 933, 934-935 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992). See also U.S. Ct. App. Br. at 21-22. There is no meaningful difference between the two sets of elements; to prove the first set (if done beyond a reasonable doubt) is necessarily to prove the second. Accordingly, the misapplication charges (Counts 2-7, 9-18, 20-22) were properly dismissed by the district court.

So, too, was the conspiracy charge (Count 1). To make out a charge of conspiracy under 18 U.S.C. § 371, the government would have to prove that petitioners agreed to commit the object offenses (here, misapplication of funds or making false bank entries) and that one or more of them

committed an overt act in furtherance of that agreement. Again, the elements underlying the civil sanctions establish the elements of conspiracy. A "violation" under the money penalty provisions "includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 U.S.C. 93(b)(1), 504. By their terms, then, Sections 93(b)(1) and 504 cover agreements (a type of "action * * * with another") for the purpose of "causing" or "bringing" about a violation of 12 U.S.C. 84 and 375b. In short, the banking provisions overlap with the conspiracy elements, just as they overlap with the substantive misapplication charge.[18]

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[18] The two remaining charges (Counts 8 and 19) allege that petitioner Rackley caused false entries to be made in certain bank records, in violation of 18 U.S.C. § 1005. If the Court accepts the "same offense or transaction" standard, these counts should also be dismissed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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